Fiscal Law Update

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Personal Expenses

- Questions to ask:
  - Do you have specific statutory authority?
  - Is there a reasonable relationship between the proposed expenditure and the purpose for which the funds were appropriated?
  - What is the benefit to the agency?
  - What is the benefit to the individual?
  - Is there a more cost effective way to achieve the agency mission or program goals?

- Examples:
  - Registered traveler programs
  - Health promotion items
  - Recruiting items
  - Gifts and other giveaway items

Examples of Proper Giveaway items

- Caps and other items distributed to a local residents in furtherance of threatened eider conservation plan – US Fish and Wildlife Service, B-318386, 12 August 2009
- Gift cards for respondents to the Converter Box Coupon Program Survey - National Telecommunications and Information Administration, B-310981, 25 Jan 2008
- Lava rocks distributed by National Park Service at Capulin Mountain National Monument, B-193769, 24 Jan 1979

Examples of Improper Giveaway Items

- T-shirts with the CFC logo given to employees who contributed a certain amount
- Ice scrapers imprinted with the logo “Don’t Drink and Drive”
- Novelty plastic garbage cans containing candy in the shape of solid waste, given by EPA to attendees at an exposition
- Decorative ashtrays given to conference attendees

Banking and Laundering Funds

If it sounds too good to be true, it is.

Sending money to GSA does not change the character of your money!

(Neither does MIPRing it somewhere!)

Nor can you extend the life of money by offloading it somewhere!

United States Capitol Police – Advances to Volpe Center Working Capital Fund

B-319349, June 4, 2010

- Amounts withdrawn from a fiscal year appropriation and credited to a no-year fund are available for obligation only during the fiscal year of availability from which the amount was drawn and maintain their fiscal year identity until earned by the revolving fund.
- *See also* Implementation of the Library of Congress FEDLINK Revolving

Full Funding

An end item is fully funded if:

- funds are programmed, budgeted, and approved to cover the total estimated cost of the contract quantity of end items at the time of contract award
- the item must be a complete and useable item
- no future year appropriation is required for delivery of the end item unless authorized by Congress

* You may not buy an end item with two (or more) different years of money.

Full Funding Exceptions

- Advance Procurement
  - allows programs to order items that have a long lead in advance of ordering the complete, usable end item
- Advance Economic Order Quantity (EOQ) Procurement
  - applies to multiyear procurements when it is advantageous to buy a large quantity of items up-front

*Congressional authorization required!

Incremental Funding

- Generally available for RDT&E,N funded efforts, as well as certain others authorized in accordance with DFARS 232.703-1(1)(i)
- For RDT&E funded contracts:
  - effort funded in increments coincident with the fiscal year (typically the appropriation's first year of availability)
  - includes all liabilities created during the time period
  - short term contracts (non-severable work; completion within 18 months) may be fully funded
  - (GAO may not agree, btw . . .)

A Case Study . . .

- DoD IG issued draft report on August 9, 2010 regarding DoD purchases made through DOE
- IG concluded that Navy improperly incrementally funded a non-severable order with RDT&E funds
- Total estimated amount of order is $1.8M; $734,972 was initially funded
- IG cited to *Financial Crimes Enforcement Network—Obligations under a Cost-Reimbursement, Nonseverable Services Contract*, B-317139, June 1, 2009 (FinCEN case)

DoD Incremental Funding Policy

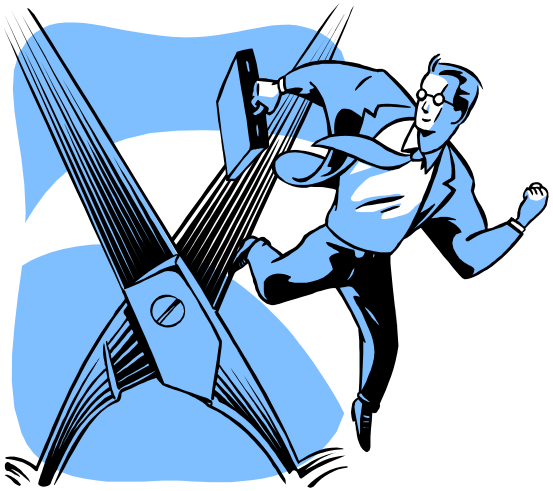
- FMR Vol. 2A, Ch. 1, para. 010214

- Requires RDT&E to be incrementally programmed and budgeted such that “only those funds required for work in a given fiscal year shall be included in the RDT&E budget request for that fiscal year…”

DoD IG Conclusion

- DoD IG :
  - “According to the statement of work, the contractor was to deliver the prototype software tool to include all necessary software source code, technical data, servers, databases, connections, and other elements necessary to operate, use and maintain the system.”
  - Believes project was for nonseverable services since the services were related to a specified end product.

FinCEN Case



- A nonseverable services contract that is not separated for performance by fiscal years may not be funded on an incremental basis without statutory authority.

- Failure to obligate the estimated cost of a nonseverable cost reimbursement contract at time of award violates the *bona fide* needs rule.

Financial Crimes Enforcement Network – Obligations under a Cost-Reimbursement, Nonseverable Services Contract, B-317139, June 1, 2009

Other Cases

- *Incremental Funding of U.S. Fish and Wildlife Service Research Work Orders*, B-240264, Feb. 7, 1994 (FWS case)
  - 4 year study on effects of harvesting frogs
  - Non-severable, to be fully funded with FY funds current at time of award
  - Upon execution of the work order, the contractor was "committed to the completion of the …research project"
  - "[W]ork product envisioned…is the completed study, nothing less"
- *National Park Service Soil Surveys*, B-282601, Sept. 27, 1999
  - Performance of a soil survey set forth specific work to be completed for each phase of the survey (methodology, aerial photographs, purchases of equipment, soil survey correlation, interim reports , final report)
  - The fact that various phases or components of project will

FMC’s Conclusion

- Our project was properly written as severable and each component part could be funded separately
  - Distinguishable from FinCEN and FWS cases
- FinCEN and FWS cases can be read in conjunction with incremental funding policy
- Draft SOW for project such that it identifies separate tasks and/or phases that can each be separately performed and funded
- Entire, non-severable effort may generally be incrementally funded under policy (true incremental funding); however, may be deemed inconsistent with GAO caselaw

Continuing Resolutions

- Provides budget authority usually until a fixed cut off date specified or replaced by an Appropriations Act.
- Differ considerably from regular Appropriations Act.
- May incorporate specific terms and conditions, sometimes from regular Appropriations Act.
  - "…and under the authority and conditions provided in such Acts…"

Typical CR Provisions

- Rate For Operations
  - Sec. 101 - “…at a rate for operations as provided in the applicable appropriations Acts for fiscal year 2009…”
  - Sec. 103 – “Appropriations made by section 101 shall be available to the extent and in the manner that would be provided by the pertinent appropriations Act.”

- Apportionment
  - Automatic apportionments from OMB will be for either an amount prorated based upon the percentage of the year covered by the CR or the historical seasonal rate of obligations for the period of the year covered by the CR.

- No New Starts

No New Starts

Typical CR Language:

“SEC. 102.(a) No appropriations or funds made available or authority granted…for the Department of Defense shall be used for (1) the new production of items not funded for production in [the preceding fiscal year] or prior years; (2) the increase in production rates above those sustained with [the preceding year’s] funds; or (3) the initiation, resumption, or continuation of any project, activity, operation, or organization…for which appropriations, funds, or other authority were not available during [the preceding fiscal year].”

SEC. 104. No appropriation or funds made available or authority granted…shall be used to initiate or resume any project or activity for which appropriations, funds, or other authority were not available during [the preceding fiscal year].”

Definition of New Start

"A program, subprogram, modification, project, or subproject not previously justified by the Department and funded by the Congress through the normal budget process is considered to be a new start."

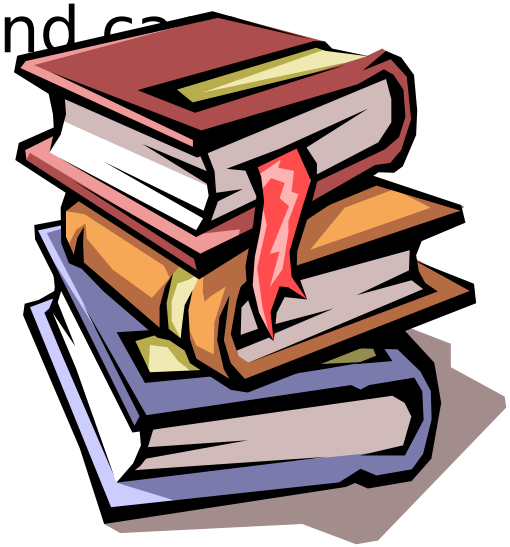
DoD FMR Vol. 3, Ch. 6, Para. 060401E

Considerations

- Budget Exhibits – funding and project justification for preceding fiscal year.
- Scope of proposed action – increase in production? New contract action?
- Must stay within CR budget authority and apportionment
  - Can you obligate total amount for all contracts
  - May have to cut back or delay some contract awards
  - May have to cut back or delay some operations

CR Guidance and Resources

- OMB Guidance
  - OMB Circular No. A-11, section 123
  - OMB Bulletin 10-01 (http://www.whitehouse.gov/omb/assets/bulletins/b10-01.pdf)
- GAO Redbook Volume 2, Chapter 8 (and ca
  law)
- FMR Vol 3, Chapter 6, Para. 060401E
- DoD Guidance
- Navy Guidance
  - Guidance for DON FY 2010 CRA :



(https://fmbweb1.nmci.navy.mil/exec/docs/FY2010DONcontinuingresolution

Funding Gaps

- Occurs when budget authority expires and there are no appropriations or continuing resolutions.
- No incurring obligations in advance of appropriations.
  - Agencies to cease normal operations – DOJ opinions permit restricted government operations.
    - Activities otherwise authorized by law and funded with no year/multiyear appropriations;
    - Activities authorized through extraordinary contract authority – food and forage act;
    - Activities that protect life and property
    - Certain phase down activities other than normal operations.
  - DOD provides specific guidance on types of activities that may continue

State Imposed Taxes vs Fees

Absent a waiver of sovereign immunity, appropriated funds are not available to pay a “fee” imposed by a state that in reality is a tax.

Administrative Office of the U.S. Courts – California E-Waste Recycling Fee, B-320998, May 4, 2011

The Antideficiency Act

- U.S. Secret Service violated the ADA by reprogramming and using funds without first providing a statutorily required Congressional notification – U.S. Secret Service – Statutory restriction on Availability of Funds Involving Presidential Candidate Nominee Protection, B-319009, April 27, 2010
- Army violated the ADA when, relying on estimates of obligations, it incurring obligations in excess of the amount available – Department of the Army – the Fiscal Year 2008 Military Personnel, Army Appropriation and the Antideficiency Act, B-318724, June 22, 2010.

Department of the Army – Escrow Accounts and the Miscellaneous Receipts Statute, B-321387, March 30, 2011

- Army violated the Antideficiency Act by placing the proceeds of an EUL into an escrow account under the control of the Army rather than depositing it into a special account of Treasury as required by 10 USC 2667

- Indemnification provision in an escrow agreement was a violation of the ADA